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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALAN W. KAPILOW, Plaintiff and Respondent, v. STEVEN J. BERNHEIM, Defendant and Appellant.	B235810 (Los Angeles County Super. Ct. No. BC415622)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

The Bernheim Law Firm, Steven Jay Bernheim, Nazo S. Semerdjian; Law Offices of Martina A. Silas and Martina A. Silas for Defendant and Appellant.

Beverly Hills Law Associates and Stephen M. Losh for Plaintiff and Respondent.

Steven J. Bernheim appeals from the judgment entered after a one-day court trial awarding Alan Kapilow $311,000 in damages, plus prejudgment interest, under a personal guaranty executed by Bernheim and David DeFalco in connection with Kapilow's $325,000 investment in Nowhere House, LLC for production of the film "Chaos." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kapilow and Nowhere House entered into a series of investment agreements for production of the film "Chaos."[1] DeFalco, the writer and director of the film and majority owner of Nowhere House, signed the agreement as Nowhere House's manager. Each agreement was substantially the same with the exception of the amount of Kapilow's investment. The final agreement, dated March 22, 2003, provided that Kapilow would invest a total of $325,000 upon execution of the agreement; in return, Kapilow would receive 100 percent of gross revenue generated by the film and received by Nowhere House until his investment was fully recouped and thereafter one-third of all gross revenue generated by the film and received by Nowhere House for a period of 10 years. Contemporaneously with the execution of this agreement DeFalco and Bernheim, who was a minority owner of Nowhere House and the creative producer of "Chaos,"[2] signed a personal guarantee in their individual capacities, promising "to pay Alan Kapilow his entire investment of three hundred twenty five thousand dollars by July 1, 2004 in the event that Alan does not recoup his investment by that time."

Kapilow's initial $100,000 investment in Nowhere House was provided by a check drawn on the bank account of Kapilow & Son, Inc., a subchapter S corporation owned by Kapilow. At least some of Kapilow's subsequent contributions were from his

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[1] The film's initial, tentative title, reflected in the original investment agreement, was "The House in the Middle of Nowhere."

[2] "Chaos" was identified in advertising materials as a "Steven Jay Bernheim production of a David DeFalco film," "based on an original idea by Steven Jay Bernheim and David DeFalco." Kapilow was listed as "executive producer"; Bernheim as "producer."

personal checking account, but there may have also been additional checks from Kapilow & Son. The total amount invested by Kapilow was disputed at trial.

"Chaos," which was marketed as "the most brutal movie ever made," received a NC-17 rating ("no one 17 and under admitted") and was not successful. Kapilow ultimately received a payment of $14,000 from Nowhere House (apparently from DVD sales) but no other return on his investment.

Bernheim acknowledged the validity and enforceability of the personal guarantee but disputed the extent of his obligation to Kapilow under it. Bernheim contended he was only required to pay half of the sum due to Kapilow; DeFalco was responsible for the other half. In addition, he insisted Kapilow was entitled only to reimbursement for funds he personally contributed to Nowhere House, not sums that came from Kapilow & Son or any other person or entity. Asserting he had not seen evidence that Kapilow had personally contributed more than $83,000, Bernheim offered to pay Kapilow $34,500 (one-half of $83,000 - $14,000). Kapilow rejected the offer.

On June 12, 2009 Kapilow filed a complaint and on June 24, 2009 a first amended complaint against Nowhere House and Bernheim asserting claims for breach of contract, account stated, money lent and breach of fiduciary duty. (DeFalco, who was not named as a defendant, had declared bankruptcy and included his obligation under the guarantee as one of his debts.) After Bernheim's demurrer was sustained in part and overruled in part, Kapilow filed a second amended complaint, asserting claims for breach of contract, account stated and breach of fiduciary duty. Bernheim successfully moved for summary adjudication as to the causes of action for account stated and breach of fiduciary duty. His motion for summary adjudication of the breach of contract cause of action was denied.

The matter was tried to the court on June 6, 2011. Kapilow and Bernheim were the only witnesses at trial; a portion of Kapilow's deposition transcript was also read. Kapilow testified he initially invested $100,000 at the request of Bernheim, a friend with whom he had had previous professional dealings. According to Kapilow, the initial

investment was needed quickly. As a result, "I took a hundred thousand from my corporation that I am the sole owner of so he would have that money." Kapilow was subsequently asked for additional funds, which ultimately totaled $325,000. A revised investment agreement was prepared and executed with each new investment and Bernheim and DeFalco signed new personal guarantees.

Bernheim testified he guaranteed Kapilow's personal investment because he was his friend and also because Kapilow had conditioned any additional investment on receiving the guarantee. However, Bernheim insisted, "if he had come to me and said I want you to guarantee investments put in by other entities, by a corporation, I would have said, no, Alan, that's separate from you and I'm not guaranteeing some corporation's investment."

Several exhibits were introduced and admitted into evidence including the final revised investment agreement between Kapilow and Nowhere House for $325,000 and the personal guarantee of that investment signed by Bernheim and DeFalco. The court also admitted over Bernheim's hearsay objection an April 14, 2008 letter from DeFalco to Kapilow stating Kapilow had invested $325,000 in Nowhere House between July 31, 2002 and March 25, 2003 and received a return of $14,000 on May 7, 2007. (The attached schedule listed payments totaling $323,000 from Kapilow.)

At the conclusion of the evidence and after listening to argument, the court found in favor of Kapilow, concluding (1) Kapilow had invested $325,000 in Nowhere House, as reflected in the personal guarantee itself and DeFalco's April 14, 2008 letter; (2) the guarantee covered all funds provided to Nowhere House by Kapilow regardless of the source (that is, whether the funds came from Kapilow's personal accounts or those of Kapilow & Son); and (3) Bernheim was jointly and severally responsible (with DeFalco) on the personal guarantee for the full amount of Kapilow's investment less only the $14,000 previously paid to Kapilow. The court also ruled Kapilow was entitled to an award of prejudgment interest. Judgment in favor of Kapilow and against Bernheim was

entered in the amount of $311,000 plus prejudgment interest of $219,718.16 and costs of $2,310.75.

Bernheim moved for a new trial, arguing, in part, the DeFalco letter had been improperly admitted into evidence, the damages awarded were excessive and the court should consider newly discovered evidence—DeFalco was now prepared to testify concerning the limitations on the personal guarantee and the meaning of his April 14, 2008 letter. The motion was denied. Bernheim filed a timely notice of appeal.

CONTENTIONS

Bernheim contends Kapilow is entitled under the personal guarantee to recover only his own personal investment losses, not any losses incurred by Kapilow & Son or any other entity that invested funds pursuant to the investment agreements between Kapilow and Nowhere House. He also contends the court erred in admitting under the party admission exception to the hearsay rule DeFalco's April 14, 2008 letter as evidence of Kapilow's payments and in excluding from evidence copies of the actual checks delivered to Nowhere House.

DISCUSSION

1. *Standard of Review*

a. *Interpretation of the guarantee*

Absent conflicting extrinsic evidence, the interpretation of a written contract is a question of law. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons*, at p. 865; see also Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (Civ. Code, §§ 1638 ["language of a contract is to govern

its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].)

The words in a contract are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) An interpretation that renders part of the instrument surplusage should be avoided. (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.) Finally, "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643; see *Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521 ["'[i]nterpretation of a contract "must be fair and reasonable, not leading to absurd conclusions"'"].)

b. *The trial court's evidentiary rulings*

Trial court rulings on the admissibility of evidence are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197 ["[o]n appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion"]; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 ["appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.) The trial court's error in admitting or excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a "miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317; *Zhou*, at p. 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)

2. *Bernheim's Guarantee Applies to Kapilow's Entire $325,000 Investment*

The evidence at trial was undisputed that Kapilow made a series of investments in Nowhere House and that with each new contribution Kapilow and Nowhere House executed a revised investment agreement. The final agreement, dated March 22, 2003, provided, "Investor [Kapilow] agrees to provide The Company [Nowhere House] with the sum of $325,000 (the 'Contribution'), payable to the [*sic*] The Company upon execution of this agreement. . . . Failure to timely fund this amount in full shall be deemed a material breach." There was never any contention by Bernheim that Kapilow had failed to fully fund the $325,000 promised or otherwise breached the March 22, 2003 revised investment agreement.

It was also undisputed that the source of at least the initial $100,000 invested by Kapilow was his public insurance adjuster company, Kapilow & Son.[3] Bernheim admitted the agreement did not require Kapilow to provide funds directly from his personal accounts, and there can be no doubt the $325,000 investment referred to in the March 22, 2003 agreement included sums provided by Kapilow from Kapilow & Son.

Contemporaneously with the execution of each version of a revised investment agreement and apparently as a continuation of that document, DeFalco and Bernheim cosigned a personal guarantee of Kapilow's entire investment, replacing the previous amount indicated in the guarantee with the new, increased sum specified by each revised agreement. The final iteration of the guarantee, which reflected the same March 22, 2003 date as the final revised investment agreement, provided, "Steven Jay Bernheim and David DeFalco hereby promise to pay Alan Kapilow his entire investment of three hundred twenty five thousand dollars by July 1, 2004 in the event that Alan does not recoup his investment by that time."

The only reasonable interpretation of the March 22, 2003 guarantee of Kapilow's "entire investment" is that it covered the same $325,000 Kapilow had provided Nowhere

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[3] Kapilow characterized the money as an "advance," explaining, "It's at the end of the year attributable to my income by my accountant."

House as specified in the March 22, 2003 revised investment agreement itself, including whatever sums had already been contributed by Kapilow from Kapilow & Son accounts. (Cf. *Friedman Professional Management Co., Inc. v. Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 33 [court must interpret contracts to try to give effect to every clause and to harmonize the various parts with each other].) If Bernheim and DeFalco had intended to exclude from the scope of their guarantee those funds previously advanced by Kapilow from his subchapter S corporation, the document needed to say that. It did not.

Bernheim's related argument that Kapilow lacks standing to recover for investment losses suffered by Kapilow & Son also misses the mark. While it may be true, as Bernheim contends, that Kapilow is not the alter ego of his company and that he is not entitled to assert in his individual capacity legal claims that properly belong to it, Kapilow's action was for breach of the agreement to repay *him* the entire $325,000 invested in Nowhere House, less the $14,000 previously recouped. Kapilow was a party to that agreement with the legal capacity to enforce it whatever his measure of damages might be under some other legal theory. Similarly, the financial arrangements between Kapilow and Kapilow & Son, if any, regarding funds advanced by the company are simply irrelevant to Kapilow's right to sue Bernheim for breach of the personal guarantee contract.

3. *Any Evidentiary Errors Were Harmless*

a. *Exclusion of checks from Kapilow and Kapilow & Son*

After Kapilow testified briefly as a witness in the defense case pursuant to Evidence Code section 776 (examination of adverse party) and portions of his deposition testimony were read into the record, Bernheim's counsel asked to recall Kapilow "for the limited purpose of marking the personal checks as exhibits that were referenced by Mr. Bernheim and he was asked about"—that is, three checks from Kapilow's personal account (totaling $83,000) and three checks drawn from Kapilow & Son accounts (totaling $155,000). Kapilow's counsel objected because the checks had not been included on the parties' joint list of trial exhibits. After confirming that the documents

were not on the exhibit list and had not been made available prior to the final status conference as required by Los Angeles Superior Court Local Rule 3.52, the trial court denied the request.

Bernheim argues on appeal the checks should have been admitted under Local Rule 3.52 because they were "anticipated in good faith to be used for impeachment," an express exception to the rule's requirement that exhibits must be exchanged before trial. Specifically, Bernheim contends the checks impeached Kapilow's testimony that Kapilow & Son had advanced only $100,000 of the total $325,000 provided to Nowhere House and that he had written personal checks for the remaining $225,000.

Bernheim's trial counsel did not attempt to justify her omission of the checks from the joint list of trial exhibits on the ground they were to be used as impeachment evidence.[4] Even if that failure does not forfeit the point on appeal, we have significant doubt whether the checks constitute impeachment evidence within the meaning of the superior court's rules. Never contesting the enforceability of the personal guarantee itself, the principal thrust of Bernheim's defense was that he had to repay only those sums invested by Kapilow from his personal accounts, not funds advanced by Kapilow & Son.[5] Although the checks may have had an incidental tendency to disprove the truthfulness of portions of Kapilow's testimony, their primary relevance was to establish under Bernheim's interpretation of the guarantee that Kapilow was entitled to no more than $156,000 in damages (that is, $325,000 reduced by $155,000 paid by checks drawn on Kapilow & Son accounts and the $14,000 repaid to Kapilow from DVD sales) and perhaps as little as $69,000 (the $83,000 total of three checks from Kapilow's personal

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[4] In response to the court's question whether the checks were on the exhibit list, Bernheim's counsel stated only, "They were not, but Mr. Bernheim was questioned extensively about the evidence that he saw of the payments."

[5] As discussed, Bernheim also argued he was not jointly and severally liable with DeFalco on the guarantee and was obligated to pay only one-half of any sums due Kapilow. The trial court rejected that position, and it has not been pursued on appeal.

account less $14,000). They were properly introduced as part of Bernheim's defense case-in-chief, not impeachment evidence.

In any event, any error in excluding the checks was harmless. As discussed above, Bernheim was obligated under the guarantee to repay to Kapilow the full amount of the unreimbursed funds he had provided to Nowhere House whether the original source of the investment was Kapilow's personal account or an account from Kapilow & Son. Thus, whether $100,000 or $155,000 or even more initially came from a Kapilow & Son account was irrelevant. Moreover, the court heard testimony that Kapilow had been unable to produce copies of checks totaling more than $238,000; the checks themselves were plainly cumulative on this point. The court looked to other evidence (discussed in the following section) to conclude the full $325,000 had been invested. It is not reasonably probable admission of the checks themselves would have led to a result more favorable to Bernheim. (See Evid. Code, § 354; Code Civ. Proc., § 475; see generally *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 [so-called *Watson* standard applies generally to trial errors occurring under California law, precluding reversal unless the error resulted in a miscarriage of justice]; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

b. *Admission of the April 14, 2008 DeFalco letter and schedules*

DeFalco's April 14, 2008 letter stating Kapilow had invested "a grand total amount" of $325,000 with Nowhere House for the motion picture "Chaos" and the attached schedule headed "Nowhere House Deposits" are unquestionably hearsay evidence—"evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." (Evid. Code, § 1200, subd. (a).) Although the trial court had ruled the letter and schedule inadmissible during earlier summary judgment proceedings, it admitted the letter at trial under the party admission exception to the hearsay rule. (Evid. Code, § 1220.)[6] The

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[6] Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which

court explained DeFalco's April 14, 2008 letter was written in his representative capacity as manager of Nowhere House. Kapilow also presented at trial a letter, not previously seen by the court, extending the statute of limitations on his claims regarding the investment in "Chaos," signed by both DeFalco and Bernheim in their individual capacities and on behalf of Nowhere House. The court reasoned, "So it appears that, in fact, Mr. Bernheim and Mr. DeFalco were both members of Nowhere House, LLC, and that Mr. DeFalco on behalf of Nowhere House, LLC, is making a representation as to the amount of the investment [made by Kapilow]. And it appears that for purposes of the hearsay rule there has been adequate foundation laid to accept this document as binding." The court overruled Bernheim's hearsay objection.

This ruling was error. If DeFalco's letter was written in his capacity as a manager of Nowhere House, as the trial court found, it was admissible under Evidence Code section 1220 against Nowhere House, a defendant in the case at bar, and also would have been admissible against DeFalco individually if he had been a party to the lawsuit. (See *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 524.) However, Bernheim was not the declarant; and, although both Bernheim and DeFalco were apparently managers or agents of Nowhere House, DeFalco was not authorized to speak on behalf of Bernheim in his individual capacity. Phrased somewhat differently, that statements by both Bernheim and DeFalco were binding on Nowhere House simply does not mean their statements were binding on each other individually.

Kapilow's alternate argument on appeal that the DeFalco letter could be admitted as an adoptive admission under Evidence Code section 1221[7] is similarly misplaced. Kapilow contends Bernheim, with knowledge that DeFalco had written Kapilow

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he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

[7] Evidence Code section 1221 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

confirming his $325,000 investment in Nowhere House, "manifested his adoption or his belief in [that statement's] truth" by signing the letter extending for one year the limitations period for Kapilow to file any claims he may have against Bernheim himself, DeFalco or Nowhere House. Although the "re line" in the limitations letter recites "Kapilow $325,000 investment (Chaos Investment Agreement)," the body of the letter identifies the existence of "legal disputes and/or claims that have arisen between the parties hereto in relation to the above-referenced matter." It does not, as Kapilow contends, state that Kapilow in fact made a $325,000 investment or otherwise indicate Bernheim agreed with the information provided by DeFalco in the April 14, 2008 letter. (Cf. *People v. Lewis* (2008) 43 Cal.4th 415, 498-499 [even if defendant had knowledge of content of drawing, proponent must present evidence defendant agreed with the message it purportedly conveyed].)

Nonetheless, the trial court's error in admitting the DeFalco letter and attached schedule was harmless. (See Evid. Code, § 354; Code Civ. Proc., § 475.) To the extent the exhibit supported a finding Kapilow had invested $325,000 from his personal funds rather than from accounts maintained by his subchapter S corporation, Kapilow & Son, that distinction as to the source of the funds was immaterial for the reasons discussed above. To the extent the trial court relied on the exhibit to find Kapilow had invested $325,000, it was cumulative. Kapilow himself testified without reference to the DeFalco letter that he had invested a total of $325,000 in Nowhere House. Bernheim denied Kapilow had personally invested the full $325,000 but disputed the $325,000 figure itself only by explaining he had not seen copies of checks or backup records from Kapilow that totaled more than approximately $180,000. However, the personal guarantee itself, signed by Bernheim, stated Kapilow had invested $325,000, not, as Bernheim would now have it, that he was going to invest up to $325,000. Nothing more was needed to establish this element of Kapilow's case.

DISPOSITION

The judgment is affirmed. Kapilow is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.